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IN THE

Supreme Court of the United States

October Term, 1942.

No. 251

KATZ UNDERWEAR COMPANY,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The petitioner, Katz Underwear Co., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on April 24, 1942, found in 1942 P-H. Par. 62,685, affirming the decision of the United States District Court for the Middle District of Pennsylvania of July 17, 1941, officially reported at 39 F. Supp. 976.

Summary Statement of the Matter Involved.

This case involves the refund of floor stocks taxes on articles in chief value of cotton, in the sum of $9,878.66, and interest of $34.74, paid under the Agricultural Adjustment Act of 1933. On January 6, 1936 that Act was

held by the Supreme Court of the United States to be unconstitutional (*Butler* v. *United States,* 297 U. S. 1). Claim for refund of the taxes paid was filed January 9, 1937. The claim was rejected by the Commissioner of Internal Revenue on January 24, 1939 (App. 13a), whereupon this action was brought in the District Court for the Middle District of Pennsylvania. That Court returned a special finding of facts for the defendant upon which judgment was entered in favor of defendant. This appeal is taken from the decision of the Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court.

The errors relied upon by plaintiff are based upon the finding and decision of the District Court, affirmed by the Circuit Court, that there was not evidence from which it could be found that the plaintiff sustained the burden of the tax here involved (Finding No. 8, App. 93a; Conclusions of Law No. 1 and No. 2, App. 97a).

At trial, counsel for plaintiff and for defendant agreed that the only issue was whether the floor stocks tax had been passed on to the purchaser (App. 15a).

It was admitted by the defendant and correctly found by the Court:

1. That the plaintiff, Katz Underwear Co., is a Pennsylvania Corporation, having its principal office and place of business at Honesdale, Pennsylvania (Finding No. 1, App. 92a).

2. That plaintiff paid a cotton floor stocks tax and interest under the Agricultural Adjustment Act, to the United States of America, in the sum of $9,913.40, during the years 1933 and 1934 (Finding No. 3, App. 92a).

3. That the plaintiff filed a claim for refund of the said taxes with the Commissioner of Inter-

nal Revenue on January 9, 1937 (Finding No. 4, App. 92a), and that notice of the rejection of the claim for refund was sent by registered mail on January 24, 1939 (Finding No. 15, App. 92a).

4. That plaintiff increased the prices of some of its products after August 1, 1933, effective during the balance of the period from August 1, 1933 to December 31, 1933 (Finding No. 7, App. 92a).

Other relevant facts are as follows:

Plaintiff was a manufacturer of women's cotton pajamas, night-gowns, and similar articles, made of cotton.

Plaintiff's first witness, Katz, testified as follows:

As of August 1, 1933, there were two classifications of articles held in floor stocks—fabricated cottons (finished garments) and unfabricated cottons (goods in process and raw materials) (App. 16a, 17a). Plaintiff's business was governed by two selling seasons, one starting at the end of January and the other starting about August 1st, in each year. The styles that went on sale about August 1st were planned and determined in February or March; the line was ready for production late in June, when it would be exhibited in plaintiff's New York offices and placed in the hands of plaintiff's salesmen, advance sales through samples actually being made a few weeks prior to August 1st, 1933 (App. 17a).

The productions costs were computed on the basis of the yardage that went into each particular garment, together with the labor cost of manufacturing and the estimated factory service or overhead; from those figures, as a base, the selling prices were reckoned per dozen, generally to the nearest half-dollar.

The costs and selling prices of the various styles in the August line were determined in the period from February to June, 1933. No floor stocks tax was taken into consideration because plaintiff did not know how much tax per garment it would have to pay since the Government had not yet announced what if any would be the tax rates on cotton products (App. 18a). The tax rates were promulgated about July 14, 1933. The sales after August 1st, 1933 were made at the sales prices previously established during February to June, 1933, except that the previously established sales price was increased on 2,508 dozen garments in certain styles in the total sum of $1,482.10, and the previously established sales prices were decreased on 13,469 dozen garments in the total sum of $12,490.50. No sales price changes at all were made upon 19,842 dozen. The foregoing price revisions were put into effect about August 1, 1933 (App. 18a). On the 2,508 dozen on which sales prices were increased, a floor stocks tax of $611.04 was paid. On the 13,469 dozen on which sales prices were decreased a floor stocks tax of $3,482.90 was paid, and on the 19,842 dozen on which sales prices were not changed, a floor stocks tax of $5,824.40 was paid. This data is summarized:

Quantity	*Price Increases*	*Price Decreases*	*No Change in Price*	*Amount of Cotton Floor Stock Tax Paid on Such Articles*
2,508 doz.	$1,482.10			$611.04
13,469 "		$12,490.50		$3,482.90
19,842 "			None	$5,824.40

Certain other raw materials or piece goods not fabricated until the following year carried a tax burden of $517.18 (App. 18a, 19a). The foregoing testimony was based upon a computation made by plaintiff, which recapitulated the figures submitted to the Government. The computation was marked for identification as plaintiff's "Exhibit No. 1" (App. 19a).

At all times involved in this suit plaintiff kept its books on the accrual method and on a fiscal year basis running from August 1st to July 31st. For the period from August 1st, 1932 to July 31st, 1933, a net profit of $16,501.39 was made, whereas for the following year, during which the tax was placed and paid upon plaintiff's goods, a profit of only $5,009.81 was made (App. 19a, 20a).

No part of the floor stocks tax was billed to vendees on the sale of articles held by plaintiff on August 1, 1933, nor did plaintiff have any agreement with its vendees to be reimbursed or relieved of the burden of the tax (App. 20a). Plaintiff does not have its duplicate sales invoices because a severe flood swept over plaintiff's factory on March 17, 1937 and destroyed the bulk of office records of prior years. A photograph of the flooded condition of the factory and office was offered in evidence and admitted as plaintiff's "Exhibit No. 2" (App. 21a).

Upon cross-examination the witness Katz testified that the recapitulations submitted in the case were prepared by Mr. Frailey, the office manager of his Company. Katz stated that he had no first-hand information about the data and all his testimony (oral) was his understanding or interpretation of compiled statistics made up by Office Manager Frailey from surviving records not destroyed in the flood (App. 25a, 26a).

An affidavit previously filed with the Commissioner of Internal Revenue was then shown to witness Katz. This affidavit confirmed that the new sales prices effective August, 1933 had been increased compared with the sales prices prevailing for the preceding 1932 seasons. Katz stated that he must have been referring in that affidavit to the price increase of $1,482.10 made upon plaintiff's inventory of August 1, 1933 (App. 26a, 27a). However, since plaintiff's annual business approximated a million dollars, Counsel for defendant claimed that this increase of $1,482.10 could not have been the "drastic

price increase" referred to in plaintiff's affidavit (App. 28a).

Witness Katz stated that at the time of pricing the goods to be sold in its August line, plaintiff did not know of the amount of the tax, although plaintiff did know that there was a possibility of a tax (App. 31a). Because plaintiff did not know what the actual amount of the tax was going to be, plaintiff decided "at that particular time that for that season we were going to take it right on the chin" (App. 32a).

As to the statement in the affidavit concerning the drastic price increase made to be effective prior to August 1, 1933, Katz stated that he must have been referring therein to the price increases made upon plaintiff's August 1, 1933 inventory in the sum of $1,482.10. However, since plaintiff had also decreased its prices in the sum of $12,490.50, there appeared to be a net decrease rather than an increase (App. 34a). Thereafter the following colloquy occurred:

> "By the Court: When was this affidavit filed, and where?
>
> By Mr. Rita: This affidavit was filed with the Bureau of Internal Revenue on June 14, 1939.
>
> By the Court: In connection with what?
>
> By Mr. Rita: In connection with this claim and other claims which this Company had pending in the Bureau of Internal Revenue. I think it seriously affects the credibility of the witness.
>
> By the Court: Has that been offered in evidence?
>
> By Mr. Rita: No, sir. It will be though * * *" (App. 35a).

The witness Katz thereupon stated that to the best of his knowledge, information and belief, the statements contained in the affidavit were correct (App. 35a).

Upon re-direct examination, the witness Katz stated that the sales price increase upon the 2,508 dozen was made on styles that were highly competitive and which had been previously sold for about cost or below cost (App. 40a). The following colloquy occurred:

> By Mr. Savoy: Mr. Katz, yesterday, in testifying in answer to some questions put to you by Mr. Rita, by particular reference to your affidavit of 1939, you stated that the only price increases related to 2,508 dozen. Is that correct?
>
> A. This is correct.
>
> Q. To what were you referring? A. Referring to our inventory of August 1st, 1933.
>
> Q. To nothing else? A. To nothing else.
>
> Q. Now you fixed your prices of articles to be sold after August 1, 1933? When did you establish those prices? A. Starting in the months of February, March and April.
>
> Q. In determining the prices in February, March and April, 1933 for the sale of articles commencing after August 1st did you increase your prices over those of the preceding season? A. We did" (App. 51a).

The witness Katz then went on to testify as to these price increases made in February, March and April for the sale of articles commencing after August 1, 1933 and stated that its season wide sales price increases was due to the increased cost of the yardage or material going into each particular style (App. 51a, 57a).

Again cross-examined by defendant's Counsel, Katz stated that in purchasing the raw materials for the August 1st line, his suppliers had sharply raised the prices thereof. Katz added that in the styles upon which a sales prices advance was effected, it was generally caused by these increased costs (App. 58a-65a).

Plaintiff's second and last witness N. Frank Frailey then testified as follows upon direct examination:

1. That he prepared the claim for the refund and that he prepared plaintiff's "Exhibit No. 1" under the direction of the Company Treasurer (Katz) (App. 41a, 42a).

2. That plaintiff's "Exhibit No. 1" showed the sales prices preceding August 1, 1933 on August 1, 1933 and thereafter, and this Exhibit was the significant or chief foundation for the merits of the claim filed with the Bureau of Internal Revenue (App. 42a, 43a).

3. That the first of the two sheets of paper covered with figures and writing, headed by the word "Bloomers" and marked for identification as plaintiff's "Exhibit No. 4", was prepared by Mr. Alexander of the Bureau of Internal Revenue to illustrate the form in which plaintiff's evidence was to be prepared in support of the claim. The second sheet contained notations made by him exemplifying the Government Agent's explanation. These two sheets of paper were offered in evidence as plaintiff's "Exhibit No. 4", and are as follows (App. 43, 44a):

"PLAINTIFF'S EXHIBIT NO. 4"

(Sheet No. 1)

Bloomers		July 31	8/1	9/9
1	128	4.75	4.75	5.25
2				
3				
4				

Am't. on hand when change in price made.
Above form by Alexander.

(Sheet No. 2)

The Hotel Raleigh, On Famous Pennsylvania Avenue at 12th St., Washington, D. C.

Estimate ticket records will do.

Price established prior to Aug. 1/33.

Prevailing price after Aug. 1/1933. No. of articles on hand as established by inventory.

So far as possible number of articles sold and——

(App. 44a).

4. Office Manager Frailey stated that the claim was prepared by him in accordance with these directions and the supporting data for this claim was the exhibit marked for identification as plaintiff's "Exhibit No. 1" (App. 44a, 45a).

Plaintiff's "Exhibit No. 1" was then offered in evidence, and was received with the same force and effect as though it were the original filed with the Bureau of Internal Revenue (App. 45a).

Upon cross-examination, Mr. Frailey testified that the Exhibit contained the Company's sales prices arranged according to (a) style number and quantity, (b) the price prior to August 1st, (c) on August 1st, and (d) after August 1st, 1933. Frailey testified that all this was done pursuant to the directions of the Government Agent in Washington (App. 47a).

Defendant's first and only witness was Deputy Collector John J. Devers, Chief of the Local Processing Tax Refund Division, who testified that he made an investigation about July 27, 1938 in connection with plaintiff's claim for *another refund under Title IV of the 1936 Act* (App. 67a). Devers stated that he spoke with plaintiff's witness, Frailey, and certain other employees and that he obtained from one of these people a list of the three main garments produced by plaintiff and the various

style numbers attached thereto (App. 68a). That, in addition, he was given the style numbers and prices for those different styles and types of garments from August, 1932 up to and including August, 1936, and that the schedule he made up upon the basis of these figures given him were those papers exhibited to him and marked defendant's "Exhibits Nos. 3, 4 and 5" (App. 69a).

These schedules were intended by Devers to show the similarity of the styles covering the period from August, 1932 to August, 1936. Devers stated that he was told by one of plaintiff's employees that throughout that period the garment remained identical with the exception of very slight changes (App. 71a).

Devers also testified that he inquired as to the cost price plaintiff was paying for the cotton material which went into its garments during the period January, 1933 to August, 1933, and that he was told that the prices of the materials involved had increased after August 1, 1933 from 4½¢ a yard to 8¢ a yard in the case of broadcloth, and from 6½¢ a yard to 11¢ per yard in the case of cotton crepe (App. 72a, 73a).

He admitted that he had confined his entire investigation to the few styles which were given to him as plaintiff's leading styles, because he was told that plaintiff's entire line would run about the same way (App. 73a).

Upon cross-examination, the witness testified that he visited plaintiff's factory a second time about September 25, 1938, and that his first visit had been with reference only to a refund claim based on another law, which claim and data related only to a January, 1936 claim, and that this investigation was not in connection with the claim being litigated in this action (App. 74a, 75a).

The witness then testified that the schedules which he had first prepared were re-checked in his second investigation in September, 1938, at which time he was given the actual cost estimate tickets with reference to the 1933

styles involved in this case. He admitted to many discrepancies between his schedule as against the data contained in plaintiff's schedules. Devers then testified that the data in plaintiff's estimate tickets was correct and that he had corrected and revised his first report accordingly (App. 76a).

Plaintiff's attorney then called for the production of a letter written by Devers to the Treasury Department with reference to his second investigation. This report (App. 91a) stated therein that he (Devers) had examined all the data and that he had checked all the data, and that the same was true and correct as submitted by the taxpayer, and agreed with all the records, and that he (Devers) had mistakenly reported that there were differences in the style numbers listed in his own schedule. In this letter Devers admitted that the prices as submitted in claimant's data were correct as taken from the estimate tickets for that given period (App. 76a, 77a).

Defendant's Exhibits numbered "1", "2" and "3", and Plaintiff's Exhibit numbered "5" were then admitted into evidence and then both sides rested.

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13, 1925 (C. 229, 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A. Section 347. The judgment sought to be reviewed is that of the United States Circuit Court of Appeals for the Third Circuit entered on April 24, 1942, affirming the decision of the United States District Court for the Middle District of Pennsylvania of July 17, 1941.

Questions Presented.

On an appeal from a district court holding that the plaintiff did not bear the burden of the floor stock taxes paid under the Agricultural Adjustment Act, *must the*

Circuit Court review all of the evidence relating to the absorption of the tax to decide whether the holding of the District Court was correct first as a conclusion of law, and simultaneously as a supportable finding of fact?

Reasons Relied Upon for the Allowance of the Writ.

There is a conflict between the Circuit Court of Appeals for the Third Circuit and the Circuit Courts of Appeal for the Fourth and Seventh Circuits. The conflict arises about the question of the scope of review by a Circuit Court of Appeals where the issue decided by the lower court was whether the taxpayer established that it bore the burden of the tax within the meaning of Section 902 of the Revenue Act of 1936.

In *C. B. Cones & Sons Mfg. Company* v. *The United States of America,* 123 F. (2d) 530 (1941), 41-2 U. S. T. C. Par 9749, No. cert. filed (G) 1942 P-H Par. 61,033, the Court of Appeals for the *Seventh* Circuit stated in its opinion, page 10,755:

> "Plaintiff appeals from an adverse judgment, entered February 10, 1941, in an action brought pursuant to the Revenue Act of 1936 (U. S. C. A., Title VII, Section 644, *et seq.*) to recover a tax assessed and collected by virtue of Section 16 (a) (1) of the Agricultural Adjustment Act (U. S. C. A., Title VII, Section 616) commonly referred to as the Floor Stock Tax. The tax was paid prior to the decision in *United States* v. *Butler,* 297 U. S. 1, declaring unconstitutional that portion of the Act which authorized the levy. No jurisdictional question is raised—in fact, *the sole issue here,* as in the court below, *is whether the burden of the tax was borne by plaintiff.*

> The District Court made its findings of fact with which the plaintiff find little, if any, fault. *The controversy revolves largely around the proper conclusion to be drawn from such facts. We are convinced that the question for decision is legal rather than factual.* We shall shortly refer to the facts as found by the court. Before doing so, it seems pertinent to relate other facts as disclosed by the record so that those found by the court may be better understood." (Italics supplied.)

The Court later continued, page 10,756:

> "This court also found: 'That the increased price fixed by plaintiff on August 1, 1933, were calculated to and designed to, and did, recover all of plaintiff's costs, including the sum of $14,070.00, the amount of the floor stock taxes paid to the defendant.' We are inclined to agree with the plaintiff that this finding is more in the nature of a conclusion than a finding of fact. At any rate it presents the legal question here involved."

In the present case, *Katz Underwear Company* v. *The United States of America,* United States Circuit Court of Appeals for the *Third Circuit,* found in 1942 P-H Par. 62,685 (April 24, 1942), plaintiff similarly appealed from an adverse judgment. Here as in the *Cones* case, the only issue present before the District and Circuit Courts was whether the burden of the tax was borne by plaintiff.

The Circuit Court of Appeals in the present case did not review the District Court's decision as did the Circuit Court of Appeals in the *Cones* case. In the *Cones* case the District Court, 41-1 U. S. T. C. Par. 9314, 1941 P-H. Par. 62,482 (D. C. Ind.) found (p. 9717):

> "That the increased prices fixed by plaintiff on August 1, 1933, were calculated to and designed to, and did recover all of plaintiff's costs including the sum of $14,070.70, the amount of the floor stocks taxes paid to the defendant."

thus ruling that the taxpayer did not absorb the tax burden.

On review, the Court in the *Cones* case examined not only the facts found by the District Court but also other facts disclosed by the record—and concluded that *as a matter of law* the plaintiff had sustained the burden of the tax. The Court in reviewing and reversing the decision of the District Court stated that (p. 10,755):

> "* * * the controversy revolves largely around the proper conclusion to be drawn from such facts. We are convinced that the question for decision is legal rather than factual. We shall shortly refer to the facts as found by the court. Before doing so, it seems pertinent to relate other facts as disclosed by the record so that those found by the court may be better understood."

The Court may note that certiorari was not filed by the Government in this case (1942 P-H Par. 61,033).

In the instant case the Circuit Court of Appeals did not re-examine the facts to find whether, *as a matter of law,* the plaintiff had sustained the burden of the tax. The Court referred only to the District Court's conclusion that plaintiff's testimony was conflicting to such an extent that much of it the Court was unable to believe and that "* * * Hence, I am unable to find as a fact that the plaintiff did sustain the burden of the cotton floor stocks tax here involved" (App. 97a). *The Circuit Court remarked* that "this was a conclusion based not upon a finding that the

plaintiff's evidence was insufficient but upon a finding that it was not worthy of credit". The Circuit Court then examined Katz's testimony, *because that was the only item of plaintiff's evidence which the District Court found contradictory,* and concluded that the Court did not misapprehend Katz's testimony and that its findings were justified. However, the Circuit Court failed to see the hiatus in reasoning between the finding that the District Court correctly apprehended Katz's testimony, with the conclusion that the (ultimate) findings of the District Court were justified. The Circuit Court did not examine the other evidence offered by plaintiff (which presumably was the evidence concerning which the District Court stated it was confused). If the Circuit Court had examined the other evidence, giving no weight whatsoever to Katz's testimony, the plaintiff contends that the Circuit Court would have found as a matter of law that plaintiff bore the burden of the tax. The Circuit Court did not examine and weigh such evidence despite the fact that plaintiff expressly referred to this point in its brief. Plaintiff contends that the Circuit Court should also have examined all the uncontradicted evidence to find whether as a matter of law these uncontradicted facts *required* the finding that plaintiff bore the burden of the tax. To the extent that the Circuit Court did not make such an examination in its review of the case, it is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the *Cones* case and the decision of the Circuit Court of Appeals for the Fourth Circuit in *Arkwright Mills* v. *Commissioner of Internal Revenue,* 1941 P-H Par. 63,088 (Dec. 18, 1941) No. cert. filed (G) 1942 P-H Par. 61,036, which hold that the proper conclusion to be drawn from the facts adduced at the trial is a matter of law and is not factual.

In the *Arkwright Mills* case the Circuit Court in its review and reversal did exactly what the plaintiff requested that the Circuit Court should have done in the present

case. The Court there gave *de novo* consideration to the evidence submitted before the Processing Tax Board of Review stating "that it is the Board's function to determine the weight and credibility of the evidence offered by the claimant; but in this instance the Board, acting under a mistaken view of its duties under the Act failed to give to the evidence that consideration which it deserves * * *." In its conclusion it remarked that "this expert testimony, as we have seen, was not controverted. The reliability of the statistical data upon which the conclusions were based was not questioned * * *."

It is submitted, therefore, that the decision of the Circuit Court of Appeals for the Third Circuit in the present case is clearly in conflict with that of the Circuit Court of Appeals for the Fourth and Seventh Circuits in the cases of *Arkwright Mills and C. B. Cones & Co.*, respectively. If the Circuit Court for the Third Circuit had afforded the same scope of review as was done by the other two Circuits, on the same tax issue, the Third Circuit would have reversed the findings of the lower court in the instant case. There is now a conflict between the aforementioned Circuit Courts of Appeal on the question of what is the proper scope of review by a Circuit Court of Appeals where the issue decided by the lower court was whether the taxpayer established that it bore the burden of the tax within the meaning of Section 902 of the Revenue Act of 1936. This conflict should be resolved by the United States Supreme Court, especially since a *few hundred cases* are now pending in District Courts where the same issue may arise on review.

* * * * *

Plaintiff, in petitioning for a writ of certiorari, believes that the result of a *proper review* of the record by the United States Circuit Court of Appeals for the Third Circuit, would be either a finding that plaintiff was entitled to a judgment because it bore the burden of the

tax here involved or else that a new trial would be ordered at which full findings of fact would be made.

The *documentary evidence* submitted by plaintiff conclusively established that it bore the burden of the tax here involved.

The trial court found that the evidence offered by the plaintiff was "for the most part extremely confusing and contradictory" and therefore the plaintiff did not establish to its satisfaction that it bore the burden of the tax. The U. S. Circuit Court of Appeals for the Third Circuit stated that this conclusion of the trial court was based *not upon a finding that the plaintiff's evidence was insufficient* but upon the trial court's finding that it was not worthy of credit. (The contradictory evidence was only in the testimony of witness Katz.) The Circuit Court then examined what the trial court considered to be the contradictory evidence (testimony of Katz) offered by the plaintiff, found that the trial court did not misconstrue said testimony, and then jumped to the conclusion that the trial court was therefore justified in finding that the tax was not absorbed.

Under the Civil Procedure Rule 52 (a) (28 U. S. C. A. following Sec. 732 c) that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," the Circuit Court found that the trial "court did not misapprehend Katz's testimony and that its findings were justified".

Plaintiff does not contest that Katz contradicted and confused himself. However, plaintiff contends that if all of Katz's testimony were excised from the record the other uncontradicted testimony and documentary material offered by plaintiff conclusively established that plaintiff bore the burden of the tax. Though the Circuit Court might have been justified in refusing to set aside the finding of the trial court that Katz's testimony

was contradictory, yet it should have set aside the finding that "there was not evidence from which it could be found that the plaintiff sustained the burden of the tax here involved" (App. 93a). *The only part of plaintiff's evidence which was contradicted was Katz's testimony.* Having examined Katz's testimony and finding itself able to agree with the trial court's conclusion concerning that testimony the Circuit Court incorrectly, (and without any consideration of the other evidence at all) went much further and *concluded that therefore the ultimate findings of the trial court were correct.* In this respect, plaintiff respectfully urges that the Circuit Court had erred.

Plaintiff submits that even without the aid of Katz's contradictory testimony, the other uncontradicted evidence submitted was sufficient and conclusively established that plaintiff bore the burden of the tax. That the trial court found the case confusing is understandable but this is due to the confusing nature of the subject matter rather than to the fault of the plaintiff.

Though confusing, once understood, this remaining evidence clearly proved that plaintiff bore the burden of the tax. Although it was uncontradicted neither the District Court nor the Circuit Court analyzed or evaluated such evidence. The District Court found it confusing because it perhaps had never clearly organized the evidence and so never clearly understood it. (Just because a case is complex and the uncontradicted evidence is hard to analyze is no authority for a Court's decision to ignore that evidence on the ground that it is "confusing".) This evidence, once understood, would have caused an indubitable conclusion in favor of the plaintiff. Plaintiff therefore submits that since the evidence was not judicially appraised, it has not yet had a real day in court. It was insufficiently considered by the trial court and not considered at all by the Circuit Court of Appeals. Finally, had such evidence been properly weighed and adequately

considered by the Court it would conclusively have established that plaintiff bore the burden of the tax here involved.

Let us review the record:

Plaintiff, on August 31, 1933, filed a tax return of articles in chief value of cotton, held by it on August 1, 1933, with the Collector of Internal Revenue, and on August 3, 1934, filed an amended return; plaintiff paid to the Collector the total floor stocks tax of $9,913.40. Plaintiff claimed a refund of said sum, together with interest thereon, because plaintiff absorbed the burden of said tax. Defendant offered evidence to show, and plaintiff admitted, that it had increased its selling prices *prior* to August 1, 1933, for the season of business starting August 1, 1933. This is the point on which Katz's testimony was found to be contradictory, and since plaintiff conceded the increase, Katz's testimony on that point really is surplusage. The Devers report which defendant submitted to prove these price increases also contained the unrebutted evidence of increased costs of production to the plaintiff. This evidence substantiated the other testimony that increased selling prices were due to increased costs. However, the point on which the plaintiff and defendant disagreed was whether the increased selling prices were not only sufficient to compensate for increased costs but whether they were also sufficient to cover the $9,913.40 floor stocks taxes paid to the government on the floor stocks held as of August 1, 1933. Because of a flood in Honesdale, Pa., concededly beyond plaintiff's control, all original records of sales, in the form of duplicate sales invoices, were destroyed. The available records were "cost estimate" tickets which form the basis for plaintiff's selling prices. From these "cost estimate" tickets the plaintiff prepared a schedule (App. 99a) of selling prices, which the defendant's witness (Deputy Collector Devers, Field Chief of the Proc-

essing Tax Refund Division) conceded to be correct. According to this schedule there was a net decrease in plaintiff's selling prices after August 1, 1933 of $11,008.40. Therefore, despite the sales increases made prior to August 1, 1933 (made in April and May of 1933, long in advance of the new season), the very fact that plaintiff subsequently reduced its selling prices by a much greater sum than that of the amount of the tax involved is proof that the plaintiff at least bore the burden of the tax (and also, presumably, part of the increased costs). This conclusion is *substantiated* by uncontradicted testimony of plaintiff to the effect that net profits for the year under discussion decreased by $11,491.58 from that of the preceding year (an amount in excess of the floor stocks tax paid). If plaintiff's increase in selling prices as of August 1, 1933, were made to cover the floor stocks tax paid as well as increased costs, as defendant maintains, then the profits for this business year should be the same as for the past business year (evidence being submitted that overhead costs remained about the same). But the net profits of this year decreased by $11,491.58, and this may be accounted for in part by the decrease of $11,008.40 in selling prices after August 1, 1933. The testimony also showed (admitted by both sides) that the manufacturing costs had increased sharply in the Spring of 1933 (increased cotton piece goods costs and increased labor costs) and were responsible for the increased selling prices effected in April and May but applicable only to sales transacted after August, 1933 when the new season began.

The District Court in its discussion stated:

> "It is clear that the burden was upon the plaintiff to establish to the satisfaction of the trial court that it bore the burden of the tax. To meet that burden the evidence offered by the plaintiff was

for the most part extremely confusing and contradictory'' (App. 93a).

The Court conceded that the loss of records by plaintiff was due to an Act of God and then discussed the evidence submitted by plaintiff. It claimed that Katz's testimony concerning August 1, 1933 selling prices was contradictory. This point is not in issue since plaintiff conceded the increase. The Court then mentioned plaintiff's evidence as to the drop in net profits of $11,491.58 as being offered to show that plaintiff sustained the burden of the floor stocks tax because said figure exceeded the tax, but the Court did not discuss it (App. 94a). The Court then suggested:

> ''Edward A. Katz testified that plaintiff increased its prices effective August 1, 1933 in the total sum of $1,400 and after August 1, 1933 it increased its prices in the total sum of $1,482.10 or a total increase of prices over those of the preceding year in the amount of $2,882.10; that the only price decrease was made after August 1, 1933 in the total sum of $12,490.50 and that the plaintiff paid a tax in the sum of $9,913.40. Thus, through the tax and net price changes the plaintiff suffered an extraordinary loss of income and increase of costs, as compared with the preceding year, in the total sum of $19,521.80 without giving any consideration to the substantial increase in the cost of materials. But, at the same time, the plaintiff's net profit decreased only $11,491.58 upon approximately the same volume of business. This summary reveals that either the figures offered by the plaintiff are erroneous or the plaintiff did not show all of the factors involved, or, perhaps, both. It is not the duty of the Court to speculate as to

the cause of the discrepancies revealed by the testimony" (App. 95a).

Plaintiff submits that this summary reveals that the plaintiff's figures are neither erroneous nor incomplete, but that the Court itself was in error and had no understanding of the accounting significance of the evidence. The Court *completely* overlooked the evidence (conceded by both plaintiff and defendant) of sales price increases prior to August 1, 1933 which was intended to make up for increased costs. That being considered, the net profits for this year would have been the same as that of last year. But there was a decrease in such net profits of $11,491.58 because of a net decrease in selling prices after August 1, 1933 of $11,008.40 and thus the tax burden could not have been said to have been passed on. The Court was clearly in error when it said: "This summary reveals that either the figures offered by the plaintiff are erroneous or the plaintiff did not show all of the factors involved, or, perhaps, both * * *" (App. 95a).

That the Trial Court was *confused* and did not reason out the merits of the case is shown by an extract from its own opinion in which it confirmed the merit of plaintiff's case:

> "The plaintiff, as stated above, offered evidence to show that on August 1, 1933 it raised its prices on some articles in the total amount of $1,482.10, and reduced its prices on other articles in the total amount of $12,490.50. This evidence was offered to show that the plaintiff did not pass the tax on to its vendees by increasing its prices after August 1, 1933. A comparison of the net decrease in prices thus shown to be $11,018.40, with the drop in net profit noted above of $11,491.58, reveals that they are nearly equal. Hence, the plaintiff's testimony equally shows that on August 1, 1933 its prices were

> such that the substantial floor stocks tax and all increased costs could have been paid without any loss in net profit, and that the plaintiff sustained the burden of the tax only because of a subsequent reduction of its prices, and consequently, the plaintiff passed the tax on to the vendees on all of its line with the *exception* of those articles as to which the price had been decreased" (App. 95a, 96a).

But the Court should have allowed a refund to plaintiff on the articles as to which the Court said the *sales prices were decreased.* On this point alone the Trial Court is clearly in error and should have been reversed.

In any event this "*exception*" is more extensive than would appear. The decrease took place among those very items the increase of the selling price of which (before August 1, 1933) the defendant urged as the method by which plaintiff was going to pass on the tax burden. Since those selling prices were subsequently decreased then, as the Court itself stated, the tax burden was not passed on. The articles on which sales prices were decreased were 13,469 dozen in number and on which about $3,482.90 was paid in cotton floor stock taxes.

The Court mentioned the evidence of defendant as to price increases on August 1, 1933 and also the objection of the plaintiff that such evidence is meaningless, since the price increases were due to increased cost prices and quantities of material used. The Court concluded: "this argument which has considerable support in the evidence, equally discredits plaintiff's evidence as to price changes effective August 1, 1933" (App. 96a). This amazing conclusion of the Trial Court was uncalled for since plaintiff had conceded having increased its selling prices long prior to August 1, 1933 and such increases are a vital part of the *plaintiff's own case.* (Without such increases, the increased costs of production would have effected a tremendous operating deficit.)

The Court finally discussed the affidavit filed by Katz with the Treasury Department and undertook to show how it contradicted Katz's testimony. Plaintiff does not wish to debate whether Katz contradicted himself, because plaintiff believes that it has conclusively proven by the remaining *uncontradicted evidence,* that it bore the burden of the tax. When the Trial Court said:

> "The plaintiff's evidence which has been outlined above and upon which plaintiff relies to establish its case is conflicting to such an extent that much of it I am unable to believe, and I cannot find any fact upon the basis of it * * *" (App. 97a).

the Court really meant that it believed Katz's testimony to be contradictory and the other evidence to be confusing. When we examine "the plaintiff's evidence which has been outlined above" and how the Court discussed such evidence, it shows not how confusing is the testimony, but how confused is the Trial Court. The Court found the other evidence to be confusing because it did not comprehend the accounting significance of such evidence. There was no lack of evidence; its effect and import escaped the Court. Plaintiff submits that merely because the Court was confused is no reason why plaintiff's substantive rights should be impaired. Plaintiff is, in effect, being deprived of due process of law. A party to an action should be allowed not merely a hearing, but an adequate hearing, and neither the Trial Court hearing nor the Circuit Court review can be said to have been adequate. The Court found against the plaintiff merely because plaintiff's case was confusing. With patience (an adequate hearing) and after some study of the accounting problem, the Court must have found that plaintiff actually absorbed the burden of the tax. (Even the Trial Court admits in effect that plaintiff was entitled to a partial recovery of $3,482.90 on the 13,469 dozen articles sold at decreased prices.)

On appeal, had the Circuit Court given proper scope to its review of the case, it would have reversed the conclusion of the District Court and found that plaintiff bore the burden of the tax involved. Erroneously, it affirmed the decision of the District Court without reviewing all the evidence and the record in its entirety.

WHEREFORE, plaintiff prays the Supreme Court of the United States to remand the case to the Circuit Court of Appeals for an adequate review, or to reverse the decisions of the District Court and the Circuit Court of Appeals and enter judgment for the plaintiff, or to reverse the decisions of the District Court and the Circuit Court of Appeals and order a new trial so that plaintiff might receive an adequate hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 251

KATZ UNDERWEAR COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 92a–97a) is reported at 39 F. Supp. 976. The opinion of the Circuit Court of Appeals (R. 155–158) is reported at 127 F. (2d) 965.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1942 (R. 158–159). The petition for writ of certiorari was filed on July 24, 1942. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Has the taxpayer, within the meaning of Section 902 of the Revenue Act of 1936, borne the burden of the tax sought to be recovered?

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to

which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

* * * * *

(U. S. C. 1940 ed., Title 7, Sec. 644.)

STATEMENT

This suit is for the recovery of $9,913.40, paid by the taxpayer during the years 1933 and 1934 as floor-stocks taxes under the Agricultural Adjustment Act.

The petition (R. 3a–5a) alleges the payment of the tax, that the statute under which it was collected was unconstitutional and void, that a claim for refund was duly filed and rejected and that the taxpayer had borne the entire burden of the tax.

The sole issue raised by the answer (R. 14a) is whether the taxpayer had borne the burden of the tax.

The District Court found (R. 92a–93a) there was no evidence that the taxpayer had borne the

burden of the tax and granted judgment in favor of the United States (R. 97a).

The Circuit Court of Appeals, after reviewing the evidence, held that the findings of the District Court were justified and affirmed the judgment.

ARGUMENT

Section 902 of the Revenue Act of 1936 makes the refund of any amount collected as tax under the Agricultural Adjustment Act conditional upon the claimant's establishing to the satisfaction of the trial court that the claimant bore the burden of the tax.

The issue with respect to the burden of the tax was sharply litigated upon the trial and evidence was offered by the Government (R. 66a–80a) which directly contradicted the taxpayer's evidence. The District Court held that the evidence adduced by the taxpayer was (R. 97a) "conflicting to such an extent that much of it I am unable to believe, and I cannot find any fact upon the basis of it." The District Court thus found, without going into the Government's case, that the taxpayer had failed by credible proof to make out a *prima facie* case under the statute. The principal error urged on appeal was that the trial judge misapprehended the purport of Katz's testimony (R. 156). The opinion below shows that the court reviewed this testimony in detail and concluded that the Dis-

trict Court was amply justified in refusing to accept it as credible.

But the taxpayer insists that even if the District Court was right in rejecting the testimony of Katz, the taxpayer's principal witness (R. 16a–41a, 51a–65a), as incredible, the taxpayer's remaining evidence was sufficient to make out a case and support a recovery. This argument overlooks the fact that Katz's testimony was necessary to explain the admitted increase in selling price and that the court below had already held that an unexplained price increase sufficient to cover the tax defeats recovery. *Honorbilt Products, Inc.* v. *Commissioner,* 119 F. (2d) 797 (C. C. A. 3rd).

There is no conflict with *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. (2d) 530 (C. C. A. 7th), and *Arkwright Mills* v. *Commissioner,* 127 F. (2d) 465 (C. C. A. 4th). In the *Cones* case the Circuit Court of Appeals held that the price increase was caused by factors other than the tax. Although we think the case is doubtful, it is not applicable here because with the elimination of Katz's testimony the price increase is unexplained. The *Arkwright* case was remanded to the Processing Tax Board of Review to consider evidence which it had rejected as not pertinent. It is not in point here.

CONCLUSION

The decision of the court below is correct. There is no conflict with other decisions. There is no question of general importance presented. The petition should therefore be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 251.

KATZ UNDERWEAR COMPANY,
Plaintiff-Appellant,

AGAINST

THE UNITED STATES OF AMERICA,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari.

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IN THE

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Katz' testimony was *not* necessary to explain the admitted increase in selling prices.

The report by John J. Devers, Chief of Processing Tax Division (App. 69a-71a), which respondent submitted to prove these selling price increases also contained the unrebutted evidence of increased costs of production to the plaintiff. In addition, in a letter from Devers to the Collector of Internal Revenue, Scranton, Pa. (App. 89a), Revenue Agent Devers admits and verifies in the last two paragraphs (App. 91a) that the increase in selling prices was due to losses suffered in the previous period (before August 1, 1933). In other words, Devers confirmed that increased costs of production (incurred before the AAA taxes were announced) were responsible for the increased selling prices. Thus, the AAA taxes had noth-

ing to do with sales price increases and there was no shifting of the tax burden. (See *C. B. Cones & Son Mfg. Co.* v. *U. S.*, 123 Fed. [2d] 530 [C. C. A. 7th] and similar cases.) The doctrine in the case of *Honorbilt Products, Inc.* v. *Commissioner*, 119 Fed. (2d) 797 (C. C. A. 3rd) is not applicable here since it relates only to the narrow field where the sales price increases are unaccounted for or unexplained. But here, the uncontroverted evidence amply explains that the sales price increases (a) took place before the AAA taxes were promulgated and (b) that they were caused by factors other than the tax (increased costs of production incurred before the tax was imposed).

CONCLUSION.

The brief in opposition is insufficient. The petition for writ of certiorari should be granted.

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